OAH 16-1800-20026-2

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE DEPARTMENT OF HUMAN SERVICES

In the Matter of the Appeal by the Bemidji Area Schools, Independent School District #31, of the Department of Human Services' Denial of Adjustment to Medical Assistance Payment for Special Education Services for 2005-06, dated August 25, 2008.

ORDER ON JOINT MOTION FOR SUMMARY DISPOSITION AFTER REMAND

This matter initially came before Administrative Law Judge Manuel J. Cervantes ("ALJ") on a joint motion for summary disposition brought by the Department of Human Services ("Department") and Bemidji Area Schools, Independent School District # 31 ("District"). As part of the joint motion, the parties agreed that there were no material facts in dispute and that they wished to proceed by summary disposition. The ALJ issued a Recommendation on Motions for Summary Disposition (ALJ Recommendation), dated April 17, 2009.

The ALJ Recommendation was for denial of the Department's Motion for Summary Disposition and granting of the District's Motion for Summary Disposition. After submission of exceptions to the ALJ Recommendation, the Commissioner of Human Services issued an Order on August 21, 2009. The Commissioner's Order rejected the ALJ Recommendation and remanded the matter to the ALJ for consideration of the rulemaking record of the Medical Assistance provider rules promulgated in 1987 and consideration of the issues raised by the District that were not addressed. On remand, this matter was argued on August 3, 2010, at the Office of Administrative Hearings. The record on the remand of the summary disposition motions closed on that date.

Cynthia Jahnke, Assistant Attorney General, appeared on behalf of the Department. Christian R. Shafer, Esq., appeared on behalf of the District.

ISSUE

The issue in this case is whether the Department correctly denied the District's request to adjust the "settle-up" rate based on revised Personal care/Paraprofessional (Paraprofessional) services provided by the District during the 2005-2006 school year, pursuant to Minn. R. 9505.0450, subp. 2.

Based upon all the files, records and proceedings herein, IT IS HEREBY ORDERED:

1. That the Department's motion for Summary Disposition affirming its administrative action is DENIED; and

2. That the District's Motion for Summary Disposition to adjust the "settle-up" rate based on revised Paraprofessional services provided by the District is DENIED.

3. That the parties discuss scheduling, exchange witness lists, and identify the exhibits that each will be offering at hearing. A prehearing conference to discuss any of these issues will be scheduled at the request of either party.

Dated: September 2, 2010

/s/ Manuel J. Cervantes
MANUEL J. CERVANTES
Administrative Law Judge

Reported: Digitally Recorded, No Transcript Prepared.

MEMORANDUM

I. Jurisdiction

The ALJ and the Department have jurisdiction pursuant to Minn. Stat. §§ 14.55, and 256B.0643. The District was given notice of the hearing in this matter and the Department has complied with all relevant procedural requirements.

II. Contentions of the Parties

The District has appealed from the Department's determination letter dated August 25, 2008 from Larry Woods, Director of Health Operations, denying the District's request to adjust the "settle-up rate" to reflect the accurate paraprofessional services actually performed by District personnel in the July 1, 2005 – June 30, 2006 school year (2005-2006). The basis for the denial was the application of Minn. R. 9505.0450, subp. 2. The Department deemed the District's request as untimely under the rule. The District contends that, for a variety of reasons, the rule does not apply to the District.

III. Scope and Standard of Review

Summary disposition is the administrative equivalent of summary judgment in district court practice. Summary disposition is appropriate where there is no genuine

issue as to any material fact and one party is entitled to judgment as a matter of law when the law is applied to those undisputed facts.[1] The Office of Administrative Hearings has generally followed the summary judgment standards developed in judicial courts when considering motions for summary disposition regarding contested case matters.[2] A genuine issue is considered one that is not frivolous or a sham, and a material fact is one whose resolution will affect the result or outcome of the case.[3] A moving party, both parties herein, has the initial responsibility of showing no material fact is in dispute. The ALJ is to make a recommendation about the appropriate interpretation of the law and about how that law applies to the undisputed facts.

IV. Facts

The Department, under Minnesota Statutes, Chapter 256B, is charged with administering the "statewide program of medical assistance." Under chapter 256B, the Department is required to make payments to medical service providers ("providers") that are enrolled in the Medical Assistance program, have provided medically necessary services and have complied with relevant state and federal laws and regulations. School districts may enroll as Medical Assistance Providers.[4]

The District is obligated by Federal law to provide special education and "related services" to students in need of such services. "Related services" include personal care assistant/paraprofessional services, among others. Minn. Stat. § 256B.0625, subd. 26, enumerates "related services", which if provided by the District, constitute covered services for which Medical Assistance payment may be requested.

The Department provides payments to a school district, as it does to other Medical Assistance providers, for covered services as the district submits claims for services actually provided, and those claims are adjudicated and approved at an interim rate. The interim rate is based upon the individual district's cost-based school year rate, established by the Department based upon a previous school year, two years prior. One year after the close of any given school year, the Department determines the "settle-up rate" for that school year's payments. The Department then recalculates all payments it made to a district during the course of the school year to reflect the settle-up rate, by re-processing the claims at the settle-up rate. If the settle-up rate is higher than the interim rate, the district receives additional payment from the Department. If the settle-up rate is lower, the Department reflects this as a credit balance. Future payments to the district are applied to the credit balance until paid off. The Department determines the settle-up rate through a mathematical formula that takes into account two basic elements: 1) the number of times that covered services were provided to eligible individuals, termed "encounters"; and 2) the number of program direct service hours of covered services that were provided by district employees or contractors.

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[1] *Sauter v. Sauter*, 70 N.W.2d 351, 353 (Minn. 1995); *Louwegie v. Witco Chemical Corp.,* 378 N.W.2d 63, 66 (Minn. App. 1985); Minn. R. 1400.5500K; Minn. R. Civ. P. 56.03.
[2] *See*, Minn. R. 1400.6600 (2004).
[3] *Illinois Farmers Insurance Co. v. Tapemark Co., 273* N.W.2d 630, 634 (Minn. 1978); *Highland Chateau v. Minnesota Department of Public Welfare,* 356 N.W.2d 804, 808 (Minn. Ct. App. 1984).
[4] Minn.Stat. § 125A.74 (2000).

The District is enrolled as a Medical Assistance provider. During the 2005-2006 school year, the District provided covered services to special education students. It submitted requests for payment to the Department throughout the year as the covered services were provided. The Department remitted payments to the District for these services in accordance with the interim rate.

On June 7, 2007, the District reported to the Department 24,556.45 hours and 14,828 encounters for Paraprofessional services as the total number of covered services for the 2005-2006 school year. On August 1, 2007, the Department sent the District a letter stating the District's settle-up rate for the 2005-2006 school year for Paraprofessional services was $34.80 per hour of service. The settle-up rate for Paraprofessional services was lower than the District's interim rate for 2005-2006. As a result, on October 30, 2007, a negative credit balance was reflected for the District after deductions of $93,700.05 and $4,748.06 (totaling -$98,448.11). These deductions left a negative credit balance of $90,875.16 for the District to be paid down by applying payments from future billings to the balance. Also on that date, the rate of $34.80/hour became the District's interim rate for Paraprofessional services for the 2007-2008 school year.

In March of 2008, conversations between Eileen Campbell, a District employee responsible for overseeing the District's third party billing program, and Cathy Griffin at the Minnesota Department of Education ("MDE"), resulted in the District discovering that its settle-up rate for Paraprofessional services for the 2005-2006 school year was lower than the District's interim rate because the District had reported substantially fewer Program service hours and encounters of Paraprofessional service than it had in the past. Ms. Campbell then reviewed the 2005-2006 data and discovered the source of the discrepancy. Due to personnel changes in the District during the 2005-2006 school year, the District had erroneously reported 24,556.45 hours and 14,828 encounters of Paraprofessional services when it had, according to its records, provided 40,289.53 hours and 15,017 encounters for such services. Ms. Campbell reported the correct data to Robert Vaadeland, the District's Assistant Superintendent and Director of Special Education. On June 17, 2008, Mr. Vaadeland sent a letter to the Department requesting an appeal from the 2005-2006 settle-up rate determination and subsequent deduction.

On August 1, 2008, Richard Tester, a State Program Administration Manager for the Department, contacted Mr. Vaadeland by telephone. Mr. Tester stated that the District's 2005-2006 settle-up rate for Paraprofessional services would be adjusted to reflect the accurate data.

On August 25, 2008, Larry Woods, Director of Health Care Operations for the Department, sent the District a letter which stated that: 1) the Department does not have a formal appeal process available to the District; 2) the Department was not obligated to consider the District's request because of Minn. R. 9505.0450, subp. 2; 3) the letter constituted the Department's final decision on this matter; and 4) the District may appeal this decision through the contested case process in accordance with the terms described in Minn. Stat. § 256B.0643.

The rule relied upon by Mr. Woods states in relevant part:

> [a] provider shall submit a claim for payment no later than 12 months after the date of service to the recipient and shall submit a request for an adjustment to a payment no later than six months after the payment date. The department has no obligation to pay a claim or make an adjustment to a payment if the provider does not submit the claim within the required time.[5]

The Department does not question the accuracy of the corrected number of direct service hours or encounters of Paraprofessional services. If the District's corrected direct service hours and encounters (40,289.53 hours and 15,017 encounters) are used to calculate the reimbursement rate, the District's rate for Paraprofessional services will result in a settle-up rate of $56.35, and Paraprofessional services for 2005-2006 will be paid for accordingly by re-processing the claims at the revised amount.[6]

V. Statutory Authority Analysis

The ALJ Recommendation relied upon the history of the administration of the Medical Assistance Program which was delegated to the Department by the legislature in 1967.[7] At that time, hands-on delivery of medical assistance services was delegated to the counties.[8] From this history, the ALJ concluded that Minn. Stat. Section 256B.04 was specifically written with the counties in mind. The later expansion of eligibility of school districts to participate in Medical Assistance Programs was after the Department's establishment of the state's Medical Assistance Program but prior to the school districts' lawful authority to deliver medical assistance services. From this, the ALJ concluded that the rules were adopted to govern county agencies only, and Rule 9505.0450 (setting the timelines for establishing the final reimbursement rate) did not apply to the District.

The rules governing this process were adopted pursuant to Minn. Stat. Section 256B.04, which authorizes the Department to:

> Subd. 2. Rulemaking authority. Make uniform rules, not inconsistent with law, for carrying out and enforcing the provisions hereof in an efficient, economical, and impartial manner, and to the end that the medical assistance system may be administered uniformly throughout the state, having regard for varying costs of medical care in different parts of the state and the conditions in each case, and in all things to carry out the spirit and purpose of this program, which rules shall be furnished immediately to all county agencies, and shall be binding on such county agencies.

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[5] Minn. R. 9505.0450, subp. 2.
[6] Stipulated Facts ¶ 20.
[7] Minn. Stat. § 256B.04 (1967).
[8] *Id.*

The statutory language, particularly with the specific reference to county agencies, suggested that the Legislature's intent was to authorize a rule regime that was directed at counties, not other entities that were similarly situated.

In 1987 the Department adopted the rules implementing the MA reimbursement system. As part of that rulemaking, public comment was received regarding the proposed rules, including objections to the scope of the rulemaking undertaken by the Department.[9] These objections included the assertion that many of the specific provisions in the rules were not authorized by the enabling statute. ALJ Peter Erickson analyzed the general statutory authority issues in the rulemaking as follows:

> Statutory Authority
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> 6. Statutory authority to promulgate the proposed rules is found at Minn. Stat. § 2568.04, subds. 2 and 12 (1986). Subdivision 2 of that section provides broad authority to "make uniform rules, not inconsistent with law, for carrying out and enforcing the provisions hereof in an efficient, economical and impartial, manner . . . " Subdivision 1 places a duty on the Department to "supervise the administration of medical assistance for eligible recipients . . ,'" Several persons challenged the statutory authority for certain provisions in the proposed rules, arguing that there is no specific authority to do what is proposed. In many instances, that argument is correct; the Legislature has not specifically directed that rules be promulgated in all of the areas set forth in the proposal. Minnesota-Dakotas Retail Hardware Assn. v. State, 279 N.W.2d 360 (Minn, 1979). However, the state "plan" must comply with a large body of federal law and respond to the specific needs of Minnesota recipients. The Legislature had to have intended that rules be promulgated in all areas necessary to meet the objectives of state and federal law and achieve the maximum economy to the state. Additionally, during the 1987 legislative session, bills were enacted to deal specifically with issues of "authority" raised during this proceeding. 1987 Laws ch. 378 (enacted June 2) and ch. 403 (enacted June 12) discussed infra. Consequently, except as may be set forth in the Findings below, the Judge has rejected challenges to statutory authority.[10]

The analysis of ALJ Erickson makes clear that the adopted rule creates a hierarchy of responsibilities from the Department, through local agencies (at the county or multicounty level), to providers, vendors, and concluding with MA recipients.

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[9] The District argued that the objections raised were not specified in the analysis of ALJ Erickson and therefore should not be given any weight in this proceeding. The statutory authority argument encompasses the same issue as raised by the District here, and ALJ Erickson's analysis is relevant to the resolution of that issue.

[10] ITMO the Proposed Adoption of Department of Human Services Rules Governing Eligibility to Receive Payment as a Provider in the Medical Assistance Program, Minnesota Rules, Parts 9505.0170 to 9505.0415, at 3 (ALJ Report issued July 1, 1987).

Further, school districts were identified as "providers" in the authorizing statute.[11] School districts were expressly made subject to the rules governing MA reimbursement as a condition of receiving MA payments.[12] The analysis in the ALJ Recommendation focused on the language of "relevant state . . . medical assistance statutes and rules." Assessing this statutory language in light of the established hierarchy in the adopted regulations, the reference to relevant statutes and rules is substantive. The language of the statute does not support the District's contention that the rules do not apply to school districts.

The District contended that the Department's application of the MA rules, Minn. Rule 9505.0450, subp.2, constituted ultra vires rulemaking outside of the Department's statutory authority.[13] As discussed above, the Department had the authority to implement the MA reimbursement system through rulemaking and the Department's adopted regulations carried out that responsibility. The specific argument of the District, that the Department was not expressly authorized to adopt a time period for the submission of adjustments, was addressed by ALJ Erickson in the analysis of general statutory authority for the adoption of the MA reimbursement rules. The ultra vires doctrine is inapplicable in this matter.

The District also maintained that the adopted rule language of Minn. Rule 9505.0450 was invalid as contrary to the "spirit and purpose of Chapter 256B."[14] This argument is a challenge to the adoption of the rule. Those issues were addressed in the rulemaking proceeding, and this ALJ agrees that the rule is authorized by Chapter 256B.

Another argument raised by the District is that the language of Minn. R. 9505.0450, subp. 2, operates to work a forfeiture that is not allowable under Minnesota law. As discussed below, the Department has acknowledged that the rule language affords discretion to adjust rates beyond the time line for requesting adjustments. No forfeiture is triggered by the rule.

The time period for requesting an adjustment is triggered in Minn. R. 9505.0450 by the date of the Department's "payment" to the provider. The District noted that the transaction consisted of the Department deducting $98,448.11 from the District's balance.[15] From this, the District contends that a deduction from the District's balance does not meet the "plain and ordinary" meaning of the word "payment" and therefore, cannot trigger the time period for requesting an adjustment.

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[11] Minn. Stat. § 125A.74, subd. 1 ("A district may enroll as a provider in the medical assistance program ….").
[12] Minn. Stat. § 125A.74, subd. 1 ("To receive medical assistance payments, the district must . . . comply with relevant provisions of state and federal statutes and regulations governing the medical assistance program.")
[13] District Memorandum, at 6, citing, *Minnesota Thresher Mfg. Co. v. Langdon*, 44 Minn. 37, 41, 46 N.W. 310, 312 (Minn. 1890), Minn. Stat. § 14.45; and *Rocco Altobelli, Inc. v. State, Dept. of Commerce*, 524 N.W.2d 30, 36 (Minn. Ct. App. 1994).
[14] District Memorandum, at 9.
[15] Stipulated Facts ¶ 12, Stipulated Exhibit 4.

The Department's Remittance Advice ("RA") labels the October 30, 2007, transaction as a "payment."[16] A more descriptive word would be "transaction," but the description of the transaction as a payment in the RA is sufficient to trigger the six-month period for requesting an adjustment.[17] The District's assertion that no time period was triggered is not supported.

VI. Genuine Issues Analysis

Until the final hearing on this remand, the Department contended that it had no discretion in the application of Minn. R. 9505.0450, subp. 2, and the failure of the District to timely file its adjustments compelled the Department to deny any request for an adjustment of the established rate. The District disputed this contention, noting that the rule language appears to place discretion with the agency, stating: "The department has no obligation to pay a claim or make an adjustment to a payment if the provider does not submit the claim within the required time."

At the hearing, the Department changed its position on this issue, stating that it had the discretion to refuse the District's requested adjustment. The Department requested that summary disposition be granted based on the Department's exercise of its discretion regarding the District's request, asserting that no genuine issues of material fact remain for hearing.

Well-established case law in Minnesota requires that agency decisions must be based on reason and not be arbitrary and capricious. As the Minnesota Court of Appeals has stated:

> "An agency's decision is arbitrary or capricious if it represents the agency's will and not its judgment." *In re Northern States Power Gas Util.*, 519 N.W.2d 921, 924 (Minn. App. 1994) (citation omitted). An agency ruling is arbitrary and capricious if (a) the agency relied on factors not intended by the legislature; (b) it entirely failed to consider an important part of the problem; (c) it offered an explanation that is contrary to the evidence; or (d) the decision is so implausible that it cannot be explained as a difference in view or the result of the agency's expertise. *In re Space Ctr. Transp.*, 444 N.W.2d 575, 581 (Minn. App. 1989).[18]

The Minnesota Supreme Court has addressed the need for a reasoned decision where an agency has discretion, stating that "An agency decision may be arbitrary or capricious if the decision is based on whim or is devoid of articulated reasons."[19]

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[16] Stipulated Exhibit 4.

[17] The District's interpretation would leave the Department with no period for regular submission of adjustment requests whenever the triggering event was a negative adjustment to the interim rate. This is not a reasonable application of the rule.

[18] *Power Line Task Force, Inc. v. Public Utilities Commission*, C8-00-1143 (Minn. App. May 8, 2001).

[19] *Mammenga v. State Dep't of Human Servs.*, 442 N.W.2d 786, 789 (Minn. 1989)(citing *Markwardt v. State Water Resources Bd.*, 254 N.W.2d 371, 374 (Minn.1977)).

In this matter, the Department has set out the following statements in the letter denying the District the requested adjustment:

> 1) the Department does not have a formal appeal process available to the District;
>
> 2) the Department was not obligated to consider the District's request because of Minn. Rule 9505.0450, subp. 2;
>
> 3) the letter constituted the Department's final decision on this matter; and
>
> 4) the District may appeal this decision through the contested case process in accordance with the terms described in Minn. Stat. § 256B.0643. [20]

The first two items are descriptions of provisions in the MA reimbursement rules. The latter two items are generic statements regarding the appeal rights of the District. None of the statements in the Department's letter constitutes a reason for not adjusting the reimbursement rate to the District. For the Department to rely upon the "not obligated" language in the rule as the reason for its decision implies that there was no other reason for the decision.

Assessing the facts in the light most favorable to the nonmoving party (in this instance, the District), the lack of an expressed reason for denial of the adjustment raises an issue of fact as to what basis the Department has for that denial. This issue is further supported by the statement by a Department staffer, made after the six-month period expired, that the District's requested adjustment would be made.[21] Genuine issues of material fact exist as to whether the Department's exercise of discretion was arbitrary or capricious. Summary disposition in favor of the Department is inappropriate under these circumstances.

Addressing the summary disposition motion from the District's perspective, the facts must be taken in the light most favorable to the Department. There may be an unexpressed reason for the denial to adjust rates that renders the exercise of discretion to be not arbitrary or capricious. While the Department has not provided any assertions of fact to support an inference that such a reason exists, in similar circumstances courts have remanded the issue to allow the agency to articulate any reason that may have been the basis for the agency decision.[22] Following the approach taken in those cases, and recognizing that the Department has only recently acknowledged that discretion exists regarding the decision to not adjust rates, this matter should proceed to hearing to ascertain the basis for the Department's decision. Summary disposition in favor of the District is inappropriate under these circumstances.

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[20] Stipulation, at ¶ 17; Exhibit 6.
[21] Stipulation, at ¶ 16.
[22] *See Village School of Northfield v. ISD #659*, A06-1585 (Minn. App. July 31, 2007)(discussing *Minn. Transitions Charter Sch. v. Minn. Dep't of Educ.*, No. A04-1367, 2004 WL 1049269 (Minn. App. May 11, 2004).

VII. Summary

Upon remand, the ALJ concludes that the MA payment rules were properly adopted under the rulemaking authority contained in Minn. Stat. Chapter 256B. These rules govern all MA providers, including the District. The specific rule at issue in this proceeding, Minn. R. 9505.0450, affords discretion to the Department to adjust rates after the submission period identified in the rule. Whether the Department properly exercised its discretion or whether the Department acted arbitrarily or capriciously is a genuine issue of material fact that remains for hearing in this matter. For that reason, the cross-motions for summary disposition are DENIED.

M. J. C.